

SERVED: August 12, 1998

NTSB Order No. EA-4687

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1998

Application of)

WAYNE R. LA LIBERTE)

for an award of attorney and)
expert consultant fees and)
related expenses under the)
Equal Access to Justice Act)
(EAJA).)

Docket 243-EAJA-SE-14116

OPINION AND ORDER

Applicant has appealed from the initial decision of Administrative Law Judge William A. Pope, II, served July 10, 1997, denying applicant's application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.¹ For the reasons that follow, applicant's appeal is denied.²

¹A copy of the initial decision is attached.

²Applicant opposes our consideration of the Administrator's late-filed reply brief. The applicable standard is whether he would be prejudiced by our consideration of the untimely pleading, and not the good cause standard argued by applicant.

The EAJA requires the government to pay a prevailing party certain attorney fees and costs, unless the government establishes that its position was substantially justified. 5 U.S.C. § 504(a)(1). For the Administrator's position to be found substantially justified, it must be reasonable in both fact and law. Pierce v. Underwood, 487 U.S. 552 (1988); Application of U.S. Jet, NTSB Order No. EA-3817 at 2 (1993). The EAJA is intended to caution agencies to carefully evaluate their positions, to avoid the pursuit of "weak or tenuous" cases, not to prevent the government from bringing those cases that have some risk. Application of Catskill Airways, Inc., 4 NTSB 799, 800 (1983). When key factual issues hinge on witness credibility, the Administrator is -- absent some other evidence -- substantially justified in proceeding to a hearing where credibility judgments can be made. Application of Conahan, NTSB Order No. EA-4276 at 8 (1994). Nor, as we noted in Application of Scott, NTSB Order No. EA-4274 at 6 (1994), does the EAJA intend to punish the government for making what turns out to be a losing argument that a pilot exercised poor judgment, as happened here.

In the underlying enforcement case, the Administrator alleged that applicant failed to follow an applicable abnormal procedures checklist during an emergency. The complaint was based on charges made by applicant's flight crew that, even though applicant had followed the proper checklists when they first identified a fuel leak, and, notwithstanding his proper

declaration of an emergency, applicant inexplicably refused to follow the abnormal checklist procedure that called for shutting down the leaking engine. Applicant never explained his actions to his crew. He also chose not to provide a statement to the Administrator, and he subsequently canceled an informal conference that had been scheduled with the Administrator's counsel. Applicant did assert an affirmative defense in his answer to the complaint, and he provided some explanation of that defense in his discovery response. The Administrator nevertheless proceeded to a hearing.

The law judge ruled on the merits that he believed the flight crew's testimony concerning the amount of fuel that remained available during the emergency. However, the law judge also found credible applicant's testimony that he assessed the risks of fuel imbalance and attendant control instability, in addition to the risks of further fuel loss or possible engine fire, before deciding to deviate from the checklist. The law judge upheld the Administrator's allegations, finding that regardless of applicant's risk assessment, he was not justified in deviating from the checklist. We reversed the law judge's initial decision. Administrator v. La Liberte, NTSB Order No. EA-4516 (1996).

Applicant argues in this proceeding that the Administrator's failure to give credence to his defense establishes that the Administrator was not substantially justified in pursuing this enforcement action. We disagree. Our decision in Administrator

v. Scott, NTSB Order No. EA-4003 (1993), relied on by applicant, is distinguishable. In Scott, the respondent, also the captain of an air carrier, landed his aircraft shortly after takeoff because of directions he received from the air carrier's dispatch that were relayed to him by air traffic control. From the outset, Scott asserted an emergency defense. The Administrator, however, took the position that the defense was not available because Scott had not declared an emergency to air traffic control before landing. Scott insisted that he had acted reasonably, particularly since air traffic control already knew of the emergency. The Board agreed. And, we concluded in our EAJA decision, fees should be awarded because the Administrator's legal position was flawed -- Scott was not even required to declare an emergency to air traffic control under FAR Part 121. In this case, however, the Administrator did not proceed under a faulty legal theory. The question here was one of fact, and we must resolve here whether the Administrator was reasonable in pursuing the matter based on the facts she possessed at each stage of the proceedings.

In his EAJA decision, the law judge characterizes the Board's decision as based on a credibility determination in favor of applicant, whereas, the law judge states, he found the crew more believable. We would not characterize our decision in this fashion. The gist of our decision was not, as the law judge seems to believe, a finding that applicant was more credible than his crew. We found only that there was not a preponderance of

evidence to convince us of exactly how much fuel remained at the time of the emergency. Without this information, we felt that we could not say it was unreasonable for applicant to believe that the risks associated with shutting the engine down, as the abnormal procedures checklist required, might be greater than those related to keeping it running. Therefore, we concluded, applicant's decision to not shut down the engine should not be found to support a finding of a checklist violation. The Administrator's view, even once she was made aware of applicant's analysis, that the applicant did not correctly balance the risks the situation presented, was not rendered unjustifiable by virtue of our ultimate disagreement with it.

ACCORDINGLY, IT IS ORDERED THAT:

The appeal of the law judge's initial decision denying the EAJA application is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.